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No. 06-934

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IN THE

Supreme Court of the United States

MELVYN KAUFMAN,
Petitioner,

v.

JUDITH S. KAYE AND A. GAIL PRUDENTI,
IN THEIR OFFICIAL CAPACITIES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Defendants' Brief in Opposition ("BIO") asserts that this case involves "a straightforward application" of the abstention doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971). The Petition for Writ of Certiorari (Pet.) demonstrates that the Second Circuit's decision is anything but routine. It will bar virtually all federal challenges to the procedures of state courts, and it conflicts with precedent of this Court and of other courts of appeals. Defendants' own arguments unwittingly demonstrate the need for certiorari.

1. Defendants insist that the Court of Appeals' judgment is consistent with *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974), and *Gerstein v. Pugh*, 420 U.S. 103 (1975), because the remedy sought here supposedly would "entangle the federal courts in the day-to-day management of state-court litigation," BIO 5, and "would be directed at the state-court proceeding as such." BIO 7. These conclusory assertions are simply wrong.

First, there is no possibility that the remedy in this case would interfere with any act of *adjudication* by a state court. It is undisputed that the Second Department's case assignment procedure is not operated by state-court *judges* at all. A22 (Second Department's own website); A21 (letter from Clerk of Second Department). Instead, it is an *administrative process* operated by a court *staff attorney*, operating in secret, with unfettered discretion and *no independent judicial oversight*. Pet. 3. Thus, the assignment system is comparable to the pretrial detention procedure at issue in *Gerstein*, which similarly operated administratively, without the direct participation of a state judicial officer. 420 U.S. at 107-08.

Moreover, like the detention procedure at issue in *Gerstein*, the Second Department's case assignment system is wholly separate from the proceedings on the merits in an appeal. As Defendants concede, "petitioner's constitutional

claims challenge appellate procedures that have nothing to do with whether he was a plaintiff or defendant in the underlying actions." BIO 11. And Defendants further concede that *Younger* does not bar "challenges to procedures collateral to state-court adjudication." BIO 8 n.4. Petitioner's attack on the case assignment system is just such a "collateral" issue because it is unrelated to the fraud, nuisance, property, defamation, and other state-law claims involved in the state court cases. The relief sought — a declaration that the assignment procedure operated by the court staff attorney is unconstitutional — will not affect the disposition of any state-court case and is not directed at "the state-court proceeding as such." BIO 7. In fact, the case assignment process is analogous to the judicial selection procedure at issue in *Lopez Torres v. New York State Bd. of Elections*, 462 F.3d 161 (CA2 2006), petition for cert. pending, No. 06-766, which Defendants acknowledge "does not implicate *Younger* abstention because . . . it is not part of the adjudicatory function of the state courts." BIO 13. Defendants' concessions demonstrate that the Second Circuit's sweeping ruling cannot be reconciled with this Court's decisions or with precedent in other circuits.

There is no basis for any suggestion that Petitioner seeks federal "day-to-day management" of state-court litigation, as in *O'Shea*. BIO 5, 7. Petitioner attacks the assignment system *on its face*, not its day-to-day operation. Defendants do not dispute that *O'Shea* involved the entirely distinct context of a *case-by-case* attack on the particular *applications* of state-court procedures that were concededly valid on their face. Petitioner stressed in the Second Circuit that he sought "only a declaratory judgment holding the Second Department's assignment policy unconstitutional." Reply Br. 22; *see also id.* at 26 (Petitioner seeks "only declaratory relief"); *id.* at 31 (conceding that injunctive relief would be unavailable against Defendants under 42 U.S.C. § 1983 on grounds of immunity and repeating that "Plaintiff seeks only

declaratory relief"). Petitioner also made clear that he did not ask the federal courts to decree any particular procedure as a replacement: "there are many constitutionally adequate alternatives that meet Plaintiff's standard." *Id.* at 3. "[T]he state judiciary would be free to craft a remedy in the first instance." *Id.* at 27. Defendants' speculation that a federal court might someday need to enforce declaratory relief with "intrusive reporting requirements," BIO 6, is premature, assumes that Defendants would not comply with a federal declaration, and provides no basis for denying even a partial remedy. After all, Defendants do not dispute that Congress, in enacting the Federal Courts Improvement Act of 1996, specifically reaffirmed the power of federal courts to issue declaratory relief against state judiciaries, even though injunctive relief may be unavailable. Pet. 28.

2. Defendants accuse Petitioner of "stubbornly refus[ing] to follow the proper procedure" of raising his constitutional claims in state court. BIO 15. But the undisputed fact is that Petitioner *did* raise his claims on *six* prior occasions in state court, and the state courts refused to grant relief every time. Pet. 7, 18-19.[1] The only "stubborn[ness]" displayed in this case was the state courts' persistent refusal to correct their unconstitutional system. The Second Circuit's decision therefore conflicts with precedent in other circuits opining that *Younger* does not apply where state courts are "unable or unwilling to correct continuing unconstitutional conduct." *Parker v. Turner*, 626 F.2d 1, 10 (CA6 1980).

Defendants contend that Petitioner "could have raised his constitutional arguments in his state cases pending at the time he filed his federal lawsuit." BIO 10. But Defendants do not explain how he could have done so effectively. Defendants

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[1] Defendants' assertion that "Petitioner has never raised a challenge to the Second Department's panel-assignment system in the Second Department," BIO 10, ignores the undisputed fact that Petitioner did so by letter to the Presiding Justice dated December 22, 2003. A43.

do not deny that if Petitioner had sought the recusal of individual appellate judges or had moved to have his appeals reassigned, any reassignments would have taken place under the same unconstitutional policy he was challenging. Pet. 25. Nor do Defendants explain how Petitioner could possibly have attacked, in advance, the irregular and unpredictable acts of manipulation (such as the unannounced change in the composition on the panel in the midst of oral argument in the Second Department on April 4, 2005), of which he had no prior notice. Pet. 6 n.6.

Moreover, settled law outside the Second Circuit shows that Petitioner was under no obligation to raise his federal claims in state court. Defendants never cite, much less analyze, precedent in the First, Sixth, and Seventh Circuits holding that a litigant in Petitioner's situation is not required to bring a federal claim in state court unless it arises as part of the "case-in-chief" of the state proceeding, *Habich v. City of Dearborn*, 331 F.3d 524, 531-32 (CA6 2003), or its "four corners." *Fernandez v. Trias Monge*, 586 F.2d 848, 852-53 (CA1 1978). *See also Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 529 (CA7 1988). Defendants do not dispute that Petitioner's constitutional challenge to the assignment system was completely unrelated to the state-law questions presented by the state-court complaints.

3. The Second Circuit created further circuit conflicts by applying *Younger* abstention at a time when there were no relevant pending state proceedings. When the Second Circuit applied *Younger* for the first time by any court in this case, it is undisputed that the relevant state-court proceedings cited in the federal complaint had terminated. Pet. 19.[2] Defendants' contention that the filing date of the federal complaint is the only pertinent time for assessing pendency conflicts with this Court's instruction that the time of decision is at least as

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[2] The Second Circuit was so advised in a letter brief filed at its request to address the *Younger* issue. *See* Plaintiff's Letter Brief of May 19, 2006.

important as the time of filing in determining whether *Younger* abstention is appropriate. *See Allee v. Medrano*, 416 U.S. 802, 817 (1974) (holding that question of whether *Younger* abstention was appropriate required a remand because there was no "indication in the District Court opinion or in the record that there were pending prosecutions at the time of the District Court *decision*") (emphasis added); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975) (*Younger* inapplicable where "[n]o state proceedings were pending against either [federal plaintiff] at the time the District Court issued its preliminary injunction") (cited at BIO 9-10).[3]

Defendants erroneously disparage two of the dozens of cases Petitioner cited as evidence of the circuit conflict as involving mere "dicta." BIO 10. But the cases make clear that abstention is not appropriate where – as in this case – the state proceedings have concluded by the time the federal court announces its decision to abstain. As Judge Easterbrook has explained, pendency is a transitory phenomenon, not a permanent one. *Greening v. Moran*, 953 F.2d 301, 304-05 (CA7), *cert. denied*, 506 U.S. 824 (1992) (although *Younger* "[a]bstention was appropriate . . . when the district judge resolved the case," after "the state proceeding has reached its end, abstention is no longer appropriate"); *Leaf v. Supr. Ct. of State of Wis.*, 979 F.2d 589, 595 (CA7 1992), *cert. denied*, 508 U.S. 941 (1993) ("the time for [*Younger*] abstention has expired" because the "state proceedings [had] terminated before . . . this decision") (citing *Allee*, 416 U.S. at 817). As previously noted, Pet. 22-24 & nn.17-18, most other circuits agree.[4]

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[3] *Steffel v. Thompson*, 415 U.S. 452, 462 (1974), cited at BIO 9, involved the situation where a federal district court had dismissed a federal action. But the District Court in this case did not rely on *Younger* to dismiss the federal claim. Rather, the District Court considered Petitioner's claim on the merits. The Second Circuit was the first court to invoke *Younger*.

[4] *See Guarino v. Larsen*, 11 F.3d 1151, 1157 n.1 (CA3 1993) (*Younger* inapplicable "because the state proceedings were completed by the time

4. The Second Circuit created another circuit conflict by applying *Younger* abstention where the federal and state proceedings involved the same plaintiff. The First, Sixth, Seventh, Ninth, and Eleventh Circuits have agreed with Judge Posner that *Younger* is inapplicable unless the federal plaintiff was a defendant in state court. Pet. 23 (quoting *Nader v. Keith*, 385 F.3d 729, 732 (CA7 2004) (Posner, J.), and citing numerous other cases). This is so because *Younger*'s "core" purpose is to bar a federal plaintiff from "derail[ing] the [state] prosecution" against him by "sui[ng] in federal court to enjoin the prosecution on the ground that the state statute on which it is based is unconstitutional." *Hoover v. Wagner*, 47 F.3d 845, 848 (CA7 1995) (Posner, J.).

Defendants are unable to cite a single case (besides the decision below) applying *Younger* where a federal court plaintiff was also a genuine state court plaintiff.[5] Instead,

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the district court took action on the merits"); *Bass v. Butler*, 258 F.3d 176, 179 (CA3 2001) (although abstention was once appropriate, state proceedings had since "run the[ir] course" and "[h]ence, abstention is now inapplicable"); *Canatella v. Calif.*, 304 F.3d 843, 855 (CA9 2002) (*Younger* abstention no longer appropriate because state proceedings against federal plaintiff had been completed); *Stanton v. D.C. Ct. of Appeals*, 127 F.3d 72, 74 (CADC 1997) (although abstention was once warranted "because of the pending [state] proceeding," *Younger* "abstention has now been mooted by the end of that proceeding."). *See also Sullivan v. Murphy*, 478 F.2d 938, 961-62 (CADC), *cert. denied*, 414 U.S. 880 (1973); *Marran v. Marran*, 376 F.3d 143, 155 (CA3 2004); *Jureczki v. City of Seabrook*, 668 F.2d 851, 854 (CA5 1982), *cert. denied*, 475 U.S. 1045 (1986); *Edwards v. Ill. Bd. of Admissions*, 261 F.3d 723, 728 (CA7 2001).

[5] The closest Defendants come is *Fresh Int'l Corp. v. Agr. Labor Rel. Bd.*, 805 F.2d 1353 (CA9 1986), which they contend "appl[ied] *Younger* abstention even though the federal plaintiff was nominally a plaintiff in state court as well." BIO 11. In fact, the Ninth Circuit opined that, "[a]lthough *Younger abstention ordinarily would not apply when a federal plaintiff also is the plaintiff in state court*, it applies here, because the judicial proceeding filed by [state plaintiff] was *not truly voluntary*; [that plaintiff] petitioned for review [in state court] only because [a state] Board

Defendants ostensibly attempt to "narrow[]" (BIO 12) the decisions cited in the Petition. But the attempt backfires. Defendants admit that the cases stand for the principle that, "[w]hen the plaintiff simultaneously seeks parallel remedies for the same harm in state and federal courts, the federal lawsuit does not threaten to entangle the lower federal courts in the day-to-day operation of the state courts." BIO 12. The inapplicability of *Younger* in this case follows *a fortiori*: Petitioner's parallel lawsuits threatened no "entanglement" at all because there was no overlap between the federal and state actions. The cases involved different claims, defendants, and remedies. The state-court lawsuits were filed against private and municipal parties and sought remedies for state-law claims such as fraud, nuisance, and defamation. In contrast, the federal lawsuit sought a declaration against state officers (not involved as parties in the state-court actions) on wholly different grounds. Thus, Defendants' own argument, far from explaining away the circuit conflict, in fact deepens it and undermines the Second Circuit's decision.

5. This case presents an excellent vehicle for resolving the *Younger* question presented, and Defendants' assertion otherwise is spurious. This case involves the guarantee of a fair decision-maker which lies at the heart of the judicial system. Further, this case arises at a critical time of crisis for the New York judiciary. The *Lopez Torres* decision has held unconstitutional the method of selecting the very state-court judges at issue in this case, while grand jury investigations of corruption in the state judicial system have led to criminal guilty pleas.

a. Standing is not an obstacle to this Court's review. This Court may decide the *Younger* question without reaching the standing issue, as the Second Circuit did. Pet. App. 9a n.1. The Second Circuit can then consider the standing issue

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initiated agency proceedings and entered an order against the [plaintiff]." 805 F.2d at 1360 n.8 (emphases added; citation omitted).

on remand. In any event, there is standing because, at the time the complaint was filed, Petitioner was involved in pending litigation in the Second Department. *See Newman-Green, Inc., v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."). For this reason, Petitioner is not "in the same position as any other resident of suburban New York city who might desire prophylactic declaratory or injunctive relief." BIO 14.

A suit brought by a plaintiff with standing at the time the complaint is filed does not become moot when it is capable of repetition yet evading review. As Petitioner argued below, "[i]n a Rule 12(b)(6) posture, it is not unreasonable to conclude that Plaintiff's business and property interests could lead him to future litigation in the Second Department." Plaintiff's Letter Brief to CA2 of May 19, 2006.[6] Defendants' suggestion that the dispute would not "evade" review because of the possibility of future state-court proceedings ignores the fact that this Court has consistently focused on whether the dispute in question would evade

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[6] *See, e.g., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999) (dispute not moot "in view of the multiple institutional placements [plaintiffs] have experienced"); *Morse v. Republican Party*, 517 U.S. 186, 235 n.48 (1996) (dispute not moot where defendant "has not disavowed the practice" under challenge); *Honig v. Doe*, 484 U.S. 305, 341 (1988) (case not moot where there was a "substantial likelihood" that plaintiff would suffer same harm); *Burlington N. R. Co. v. Maintenance of Way Employees*, 481 U.S. 429, 436 n.4 (1987) (parties "reasonably likely" to find themselves in future disputes); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987) ("[I]t can reasonably be expected that Roadway, one of this Nation's largest interstate trucking companies, will be subjected to similar preliminary orders in the future."); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 578 (1987) ("likely" that party would again submit mining plans); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) (case not moot where litigant "faces some likelihood of becoming involved in same controversy in the future").

federal court, as opposed to *state* court, review.[7] In addition, as noted previously, Petitioner has no effective remedy in the state courts and is not obliged to raise his federal claim there.[8]

b. Defendants' discussion of the merits of Petitioner's claim (BIO 15-17), which the Second Circuit did not reach, Pet. App. 9a n.1, need not detain this Court. Defendants mischaracterize Petitioner's claim and the allegations in his complaint, which must of course be taken as true at this stage of the case. Petitioner alleged that the case assignments in his appeals were manipulated for improper purposes, Pet. 7, and he asserted a right to a *non-manipulated* process rather than to a random one. *See Tumey v. Ohio*, 273 U.S. 510, 534-35 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972). Defendants' contention that there are other permissible assignment systems besides random allocation is therefore beside the point. Defendants do not deny that no other state or federal court has adopted a case assignment process like the Second Department's. Pet. 4.

Defendants' suggestion that Petitioner's cases were related to each other and thus could have been "deliberate[ly] assign[ed]" to the same panel of judges, BIO 1, 17, betrays Defendants' desperation. The suggestion contradicts their

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[7] *Wisconsin Dept. of Industry, Lab. & Hum. Rel. v. Gould, Inc.*, 475 U.S. 282, 285 n.3 (1986) (finding test of "capable of repetition, yet evading review" to be met in suit against state officers, despite availability of subsequent suit in state court); *Press-Enterprise Co. v. Superior Court of Cal., Riverside County*, 478 U.S. 1, 6 (1986) (noting possibility of similar closure order in the future that would be subject to state-court review); *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 603 (1982) (same); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563 (1980) (same).

[8] Defendants' reliance (BIO 14) on Justice Stevens' concurring opinion in *Nike, Inc. v. Kasky*, 539 U.S. 654, 657-58 (2003), is misplaced, for that opinion cited three factors for dismissing certiorari – (1)the absence of a final state-court judgment, (2) the absence of Art. III standing at any stage of the proceeding, and (3) the presence of difficult First Amendment questions – none of which is applicable here.

own insistence (BIO 16 n.5), as well as the official position of the Clerk of the Second Department (Pet. 5 & n.3), that Petitioner's appeals were randomly assigned (despite the undisputed statistical evidence to the contrary).[9]

Defendants' argument that this Court previously denied cert. in *Kaufman v. Fass* (BIO 15) does not militate against review. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (internal quotation marks and citation omitted). Rather, the cert. denial in *Kaufman v. Fass* shows only that the problem has not abated since then and that the Second Department will not correct its unconstitutional system on its own.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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[9] Any claim that the state-court appeals were related also fails to recognize: (1) the appeals involved different defendants, different legal issues, and different relief; (2) the only two proceedings that were truly "related" – the two LLC Appeals, Pet. 6 n.5 – were not treated as such by the state court; (3) there was direct evidence of manipulation at the oral argument on April 4, 2005, *id.* at 6 n.6; (4) Defendants concede that only two of the appeals were treated under a state rule (22 N.Y.C.R.R. § 670.7(c)(2)) "providing that related cases may be set for argument before a single panel," BIO 3; and (5) the remaining cases were not consolidated or otherwise treated as related cases heard by the same panel. Instead, certain hostile Justices reappeared on different panels hearing Petitioner's appeals, in a manner that was in no way authorized by 22 N.Y.C.R.R. § 670.7(c)(2) and that could only have been the product of manipulation.

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